No. 162. 22

Sup. Ct. of Campbell for Resp.

(16,664.)

Filed Mar. 8, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 162.

THE LACKAWANNA IRON AND COAL COMPANY ET AL., PETITIONERS,

vs.

THE FARMERS' LOAN AND TRUST CO. ET AL.

Supplemental Brief for Respondents, Moran Brothers and Henry K. McHarg.

L. W. CAMPBELL,
Solicitor for Respondents,
Moran Brothers and Henry K. McHarg.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-6-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

LACKAWANNA IRON & COAL CO. *et al.*,
Petitioners,

vs.

FARMERS' LOAN & TRUST CO. *et al.*,
Respondents.

No. 162.

Supplemental Brief for Respondents Moran Bros. and Henry K. McHarg.

We prepared our brief in this case without waiting for the brief for petitioners. We did this supposing the points made and relied on by them in the Circuit Court of Appeals would be the only ones which they would rely upon in this court. We find, however, that at least one important new point has been made and one important old point has been apparently given up by petitioners. This necessitates the preparation of an additional brief by us. The new point is that petitioners now admit that the rail was not used as part of the current expenses of operation, but was used for "retracking of the entire system," and that because this is so they have "an equitable material-man's lien" on the *corpus* and earnings. The old point, which

is apparently abandoned, is that the rail was used and consumed as part of the current daily expenses of operation, and that their claim was of the same class as coal used for daily consumption; and the case of Burnham *v.* Bowen, a coal case, was the principal case relied on to support the claim. We do not refer to this change in disparagement of petitioners' right to urge it, for as we understand it they have the right to rely here upon any legal proposition that may help out their case, whether it was ever relied on before or not. So that instead of ignoring this new point, we will in the following brief attempt to answer it. Other points made in petitioners' brief will be referred to, but not elaborately, as they are all discussed in our brief already filed.

Petitioners' new proposition is, that "a material-man who furnishes a railroad with supplies which save and preserve the property and enable it to continue a 'going concern,' has an equitable lien upon the income and the corpus of the property superior to that of the mortgage creditors." (Petitioners' Brief, p. 20.)

This proposition is divided into two sub-propositions. The first is, "that property saved and preserved by materials and supplies at the request of the owner is subject to and charged with a lien as against the owner for the value thereof." (Brief, p. 22.) The second is, that "the mortgage creditor by leaving the railway company in the possession of the property authorized it to create any liens thereon which might be necessary to keep up the property and enable it to continue to earn the interest upon the mortgage debt." (Brief, p. 39.)

These sub-propositions are presented separately; arguments made, cases cited, and the conclusion reached by counsel that both are correct. We take issue with counsel and deny their premises, question the soundness of their arguments, and differ from them materially on the conclusions they reach.

Before we enter upon a discussion of the above propositions this court should be reminded that counsel in their brief nowhere claim that the material—the rail—was supplied for or was used by the railway company as a part of its current expenses of operation, but admit that such was not the fact. They say: "The facts in the case at bar make it somewhat different from the usual run of cases decided by this court which involve the doctrine of Fosdick *v.* Scholl, 99 U. S., 235, and the furnishing of the rails to the railway company was not the ordinary case of a periodical renewal of supplies to make good the usual wear and tear upon a railroad or the sale of coal to furnish fuel to its engines" (Brief, p. 20); and they say further: "As the record shows, the track of the railway was worn out," and "there was substantially a retracking of the entire system." (Brief, p. 21.)

We quote from the brief of the petitioners' counsel so that the court may see that all hands are agreed that the rails furnished constituted no part of the current expenses of operation, and that it is conceded that they were used for purposes of reconstruction, or, as counsel say, for "retracking of the entire system."

We also call attention to the fact that counsel nowhere challenge the master's finding of fact that the rail was bought in unusually large quantities, upon the general credit of the railroad company, without any agreement that security should be given or that payment should be made out of any particular fund or in any particular way, and that the claim can not be classed as a current debt. (R., p. 101.) Nor do they gainsay the correctness of substantially the same conclusions of the Circuit Court of Appeals. (R., pp. 134 and 140.) So that the idea that the case contains any of the equities upon which preference has been usually decreed by this court may be dismissed from consideration; but that it is pregnant with facts which have in nearly every case defeated the

claim to priority should be constantly borne in mind. To secure the claimed priority, counsel put forth the above-quoted propositions, and with commendable zeal and ability try to sustain them. An examination of the adjudicated case will show, however, that while the argument is ingenious, this is by no means the first time it has been pressed upon the attention of this and other courts.

By the above propositions and the supporting arguments, the claim to priority is put upon the narrow and uncertain ground that petitioners have an equitable material-man's lien, and that the railway company had the right to create the lien so as to give petitioners priority, on the ground that the railway company was the implied agent of the mortgage creditors because it was left in possession of the mortgaged premises. Both of these propositions must be sustained before priority will be decreed. In other words, if there is no such lien as an equitable material-man or mechanic's lien on a railroad, petitioners fail; or if such a lien can exist, but the railway was not the implied agent of the mortgage creditors in contracting for the material, petitioners fail. But while petitioners apparently must fail if either proposition is unsound, we believe it is likewise true that under the facts of this case and the settled law governing such cases, they must fail if both are sound.

I.

There is no such incumbrance known as a common-law material-man or mechanic's lien on real estate, nor is there such an incumbrance known to or recognized by courts of equity. Nor is there any such lien known to common-law or equity courts as an incumbrance upon or lien against the rents and revenues of real estate in

favor of such material-man or mechanic for the price of improvements erected upon such real estate.

The roadbed of a railroad is generally regarded as real estate, and it is this real estate that petitioners claim their material improved. The rents and revenues of the railway in question consist of money. Petitioners are not now, and have never been, in possession of either the roadbed or the revenues, but have always been out of possession. There is no claim that any promise was made by the railway company to give petitioners a lien on the roadbed or the revenues, or that there was an ineffectual effort to create a mortgage or lien by contract, on either to secure the claim. So the lien must arise out of the transaction by pure operation of law, or by force of some equitable principle, if it exists. We reiterate that such a lien, even between the original parties, is a stranger to both common-law and equity courts.

Phillips on Mechanics' Liens (3d ed.), sec. 1, says: "The lien of mechanics and material-men on buildings and the land upon which they are erected, as security for the amount due them for work done and materials furnished, is the 'creation of statute,' and was unknown to either common law or in equity. The idea of lien at common law signified merely the right to hold a thing as collateral security for the payment of debt or performance of duty, and was so inseparably connected with the possession of the subject of the lien that the right arose with possession and terminated with its loss." And same author further says, at section 2, "Although in equity the possession of land is not essential to a lien, and the term is used to denote a charge or incumbrance merely, with no right to the thing itself, yet the courts of equity have so closely followed the general doctrine of the common law as to hold that land belonging to and being in possession of the proprietor and not the builder, the ma-

terials, as far as incorporated in the structure, become annexed to and form a part of the real estate, and vest accordingly as to title and possession. Without special agreement, therefore, no equity arises for a lien upon a mere building contract."

Jones on Liens (2d ed.), vol. 2, sec. 1184, says: "A mechanic's lien upon real estate is wholly a creature of statute. At common law a mechanic has no lien upon a building for labor done upon it." This court, in the case of Canal Co. *v.* Gordon, 6 Wallace, at page 571, in referring to liens of material-men, contractors and mechanics upon land, say: "Liens of this kind were unknown in the common-law and equity jurisprudence, both in England and in this country. They were clearly defined and regulated in the civil law. Where they exist in this country they are the creatures of local legislation."

This court again, in the case of Van Stone *v.* Stillwater &c., Bridge Mfg. Co., 142 U. S., at page 136, say: "This lien is a creature of the statute and was not recognized at common law."

Text books and decisions could be cited almost without limit, all sustaining our contention that a material-man has no lien, common law or equitable, independent of statute, upon real estate as security for the price of materials furnished to erect buildings or other improvements. Such is the settled law so far as ordinary real estate is concerned, and petitioners' contention to the contrary is unsound. But their contention is that this supposed equitable lien exists on railroads for necessary improvements. This we also deny. This question came up in the case of St. Louis, A. & T. Ry. Co. *v.* Matthews, 75 Texas, 92.

A statute of that State gave a lien to "mechanics, laborers and operatives who have performed labor or worked with teams, tools or otherwise, in the construction,

operation or repair of any railroad," etc. Appellee Matthews furnished to the railway company ties which were placed in the roadbed, and he claimed a lien on the road for the price of the ties. The court held that Matthews' claim did not come within the terms of the statute conferring the lien, and as he had no common-law or equitable lien, he was held to have no lien of any character. The court say:

"The legitimate inference from these averments is that appellee took a contract to furnish ties at a price named, and did so, and that in preparing and delivering them he bestowed his personal services; that he sold ties which may have been prepared and delivered by his own toil, but did not perform manual services in the construction, repair or operation of appellants' railroad.

"Looking to the averments of fact contained in the petition, under a liberal intendment, we are of opinion that the petition does not state facts giving a lien, and that the demurrers should have been sustained."

Jones on Railroad Securities, section 573, says:

"The general lien laws in favor of mechanics and others who perform labor and furnish material for the construction of buildings are usually regarded as having no application to railroads."

And at section 575 he says:

"A railroad bridge is not an improvement within the meaning of that word as used in the general lien law."

Jones on Corporate Bonds and Mortgages (2d edition of Railroad Securities), section 584, says:

"It has sometimes been sought to establish equities in favor of those who have furnished material or money for building or repairing of railroads, on the ground that the property has thus been conserved and rendered capable of profitable use. This is, in fact, an attempt to apply

to railroads the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnishes necessary repairs and supplies to a vessel. Thus, in Galveston R. R. *v.* Cowdray, a person who had furnished the iron laid upon a portion of the road claimed therefor an equitable lien in preference to an existing mortgage: first, because the mortgage covered the iron only as after-acquired property, and upon the principle of equitable estoppel, which should yield when it comes in conflict with a superior equity; and, secondly, because his property applied to the road had rendered it capable of being operated, when it otherwise could not have been used. The Supreme Court of the United States denied the claim on both points, declaring that the mortgage attached to the property as soon as it was acquired, and that the principle of maritime law contended for had no application.

"Mr. Justice Manning, referring to this case, in giving the decision of the Supreme Court of Alabama, in the recent case of Meyer *v.* Johnston, with reference to the latter principle, said: 'A ship far from home, in distress and without resource, must perish, and perhaps her crew with her, if a bottomry bond given them for repairs and supplies shall not have precedence of other liens upon the vessel. But the court does not consider a railroad on *terra firma* so beyond the reach of help from those who own it, or are concerned in it, as to justify the adoption, in such a case, of the rule relating to a ship abroad, and about to perish.'

"Accordingly, the court, in this case, refused to give precedence to the claim of a contractor for repairing and completing a railroad, although by contract with the company he was to have possession of the property until his claims were paid."

Jones on Corporate Bonds and Mortgages (Second Edition of Railroad Securities), sec. 587, says:

"A claim for materials fur hed an insolvent railway company, which is not a lien by virtue of any statute, is not entitled to payment out of the funds aris-

ing from a sale of the property at the instance of prior mortgage bondholders until the bonds are paid. A promise by the receiver to make such payments does not change the case. The ground of the application in this case was that the supplies were furnished to the road while it was run by a lessee, and that when the road came into the hands of the receiver, the parties who had furnished the supplies had an equitable lien upon the funds realized from the earnings of the road. They had no specific lien, legal or equitable, upon the property. The facts of the case were that there were large mortgages upon the road, and the company had become hopelessly insolvent. Application was made to the court to put it into the hands of a receiver in order that it might be operated for the payment of these mortgages. This was done, and the road remained in the hands of the receiver for some years. Subsequently other creditors applied to the court, it being manifest that the mortgages could not be paid in that way, or at any rate that the time would be so long that it was desirable for the interests of all that the administration of the road should be changed; and a sale of the property was ordered and made, so that the parties in interest might realize upon their claims. The court held that the petitioners had no equitable lien upon the proceeds of this sale because the prior mortgage liens must prevail, and these would sweep away the entire fund and would be only paid in part."

"Judge Drummond in making this decision, said, by way of illustration:

"'It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on, but there is another party who has a lien upon that farm, and it is sold in order that the party who has the prior lien may be paid. Now the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a court of equity and cut off the prior lien which exists on the farm and prevent it from being paid. These parties ought to be paid. They have a just claim against this road. But it is against an insolvent corporation, and they ask parties

who have a prior right and lien to pay them because those with whom they have dealt can not do so.'"

The same claim for a superior equitable lien was made by the Lackawanna Company in the case of Bound *v.* Ry. Co. (58 Fed., 473), and while it was found as a fact by the court that the rails furnished were necessary for the operation of the road, and that the president had promised to pay for them out of the earnings, the claimed superior lien was denied. This claim has been asserted in this and other courts in many cases, and has, so far as we are advised, been uniformly denied. So we feel with these lights before us that we can safely say that it is well settled that no such lien exists; and on this point petitioners must fail.

II.

Petitioners second sub-proposition is that the railway company acted as agent for the mortgage bondholders in contracting for the rail and for that reason petitioners are entitled to a priority.

If this is true the mortgagee is principal debtor.

It is claimed that this was an *implied* agency arising from the fact that the railroad company was, as claimed, left in the possession of the railway property. No claim is made that the mortgage creditors had any knowledge of or took any hand in the purchase of the rail or ever agreed that petitioners should have priority. Nor is there any claim that when the rail was purchased and put in the road there had been any default in the interest payments or that the mortgage bondholders were at that time for any other cause entitled to the possession of the railway.

The proposition is, broadly, that any and all railway companies in possession of the railway property which

is incumbered with a mortgage has the implied authority from the mortgage creditors to displace their contract priority with the purchase price—not of current supplies used from day to day to keep the road in operation, but for rail used for "retracking the entire system."

If this is law, it is very dangerous law, and steps ought to be taken without delay to cause its repeal. Such a law would strike down at a single blow every contract right, every security the mortgage creditor has, and leave him to the mercy of the mortgagor.

There is no such implied agency in the mortgagor arising from possession. A mortgage is a mere security, and the mortgagor is entitled to possession until default. This possession is entirely consistent with the rights of the mortgagee.

The mortgage in this case was recorded and the petitioners had actual notice of its existence.

Jones on Liens, vol. 2 (2d ed.), section 1477, says:

"A mortgagor can not by a contract for the repair of the mortgaged premises subject the property to a lien against the mortgagee without his consent or authority, and it is immaterial whether the mortgagee holds under a formal mortgage or holds the title absolutely as security."

In the case of Challoner *v.* Bouck (56 Wis., 652) an effort was made to establish this implied agency in the mortgagor in possession of land to incumber it against the rights of a prior mortgagee. That court say:

"If Mr. George Challoner had inquired of Mr. Bouck as to his interest in the property he would doubtless have learned the truth in regard to it. Or if he had inquired of Mr. Bouck whether he was interested in the repairs being made, or whether Mr. Felker was acting as his agent in making them, he would have exercised common prudence and diligence. But he did nothing

of the kind. If we were to hold that he had the right to rely upon the record, and assume from it that Mr. Bouck was the real owner, yet it does not appear that he used any means to ascertain whether Mr. Felker had authority to act for Mr. Bouck in the matter. While, therefore, we might be satisfied that the referee found correctly, upon the evidence, that the repairs on the mill were made by Mr. Felker with Mr. Bouck's knowledge and consent, yet we should be compelled to affirm the other finding, that in the matter of making those repairs Mr. Felker did not act for and was not the agent of Mr. Bouck. The law applicable to that state of facts is laid down in Lauer *v.* Bandow (43 Wis., 556): 'Parol agency to charge a principal's realty ought to be express and clearly established.'"

Phillips on Mechanics' Liens (3d ed.), section 225, says:

"The governing principle upon which the adjudications in contests for priority have been based is, that vested rights of purchasers or incumbrancers and, reciprocally, the liens of mechanics, are not affected or displaced, when once attached, by other rights subsequently accruing. The priorities of each are jealously protected from all hostile interference.

"The law imposes on mechanics, like other persons, the necessity to ascertain for themselves the nature of the interest, in the land to be improved, of the persons with whom they contract; and all negligence in this regard is charged to their own account. The contract must be with the owner or his agent, or the plaintiff will fail as against a subsequent mortgagee, and mere evidence of possession by the contracting party is insufficient. To allow the vested rights of third persons, not parties or privies to a contract, to be prejudiced by its terms, would be destructive of the rights of property, and entirely at variance with the office of a lien."

In Lauer and Another *v.* Bandon (43 Wis., 556), an effort was made to establish the implied agency of the

husband to charge the wife's land with a mechanic's lien.

In disposing of the case, the court say:

"In the present case there is no averment in the complaint that the work was performed and the materials furnished by the plaintiffs for the appellant, or that she did any act in respect to the erection of the house which she would not ordinarily have done had the property belonged to her husband. Neither is she charged with any fraud or collusion. The mere fact that she owned the land on which the house was erected is not sufficient to charge her or her estate with the cost of the house. There seems, therefore, to be no foundation for saying that the house was built for her; and the case is not within the principle stated in Wheeler *v.* Hall.

"Our conclusion on this branch of the case is, that the averment in the complaint that the appellant knew of the contract between her husband and the plaintiffs, and consented to and approved it, and that the same was performed by the plaintiffs, with like consent and approval, under her daily view and inspection, is entirely insufficient to raise an implied promise on her part to pay for the house, or to show that her husband really made the contract in her behalf as her agent. (Bliss *v.* Patten, 5 R. I., 376; Barto's Appeal, 55 Pa. St., 386; Fetter *v.* Wilson, 12 Ill., 90; Hughes *v.* Peters, 1 Coldw. (Tenn.), 66; Jones *v.* Walker, 63 N. Y., 612; Kneeland on Mechanics' Liens, 33.)"

"Although the above cases were decided upon statutes differing somewhat from ours, yet they contain general doctrine which goes to support the views above expressed."

In the case of Welcome W. Jones *et al.*, Appellants, *v.* Lucretia F. Walker, Respondent (63 New York Reports, 612), the court say:

"To charge a wife for work done upon her premises, under contract with her husband, there must be some evidence that he acted as agent and not as principal, and that his contract was for the wife, upon her credit and

with her consent, with knowledge that her credit was pledged, and she is understood to be the contracting party; his agency will not be assumed without any evidence."

Jones on Liens, vol. 2 (2d. ed.), section 1457, says:

"As a general statement of common law, a building erected by the owner of land becomes a part of the realty as soon as it is annexed to the land. It also becomes subject to an existing recorded mortgage of the land. The mortgagee, in a suit to foreclose his mortgage, can not be compelled to sell the building separate from the land, and to allow the proceeds of the building to be applied in satisfaction of a mechanic's lien, before obtaining satisfaction of the mortgage debt.

"Moreover, the materials furnished by a material-man, upon his filing his claim of lien, become subject not only to his own lien, but also subject to the liens of other material-men and mechanics in whose favor liens attach to the premises; for the materials become a part of the entire structure as soon as they are annexed to it.

"A law which attempts to make a mortgage existing prior to the making of any contract for the erection of a building upon the land subject to liens under the statute is unconstitutional."

In Meyer *v.* Berlandi (39 Minn., 438–443; 40 N. W. Rep., 513). Mitchell, J., delivering the opinion, said:

"This is a manifest attempt to displace all prior incumbrances upon, and vested interests in, the property, or at least to postpone them to liens under the statute subsequent in time, so that, for example, a mortgagor and a material-man or laborer, as a result of some arrangement between themselves, without the knowledge or consent of the mortgagee, might improve him out of his prior lien in the premises * * *

"No case ever held that a mortgagor could, without the authority of the mortgagee, expressed or implied, create a lien on the mortgaged property so as to give it precedence of the mortgage."

In the case of Giles *v.* Stanton (86 Texas, 620) an effort was made by a general creditor of a railway company to displace the priority of the mortgage creditors. The right to this priority was in express terms given by a Texas statute, enacted after the execution of the mortgage. In denying the claimed priority, that court says:

"The right to take possession of the road and to appropriate the earnings constituted in part the obligation of the contract, and in so far as the legislature endeavored to give a preference in the earnings to a claim which before its enactment had no lien on such earnings, in preference to the lien of a mortgage made before the law was enacted, giving a lien in express terms, the law violated the obligations of the contract, and was void, as contrary to article 1, section 10, clause 1 of the Constitution of the United States, and of article 1, section 16 of the Constitution of this State.

"Mr. Cooley says: 'If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other.' (Cool. on Const. Lim., 346)."

In Pindry on Mortgages, vol. 1, section 854, it is said:

"Money expended in improvements by the mortgagor upon the mortgaged premises, or by his grantee subsequent to mortgage, can not be a lien prior to that of the mortgage."

And at section 855, it is said:

"This rule holds the same as to third persons. Thus, if a party makes improvements on the mortgaged land with the consent of the owner, with notice of the mortgage, he has no greater rights than the mortgagor if he had made the improvements, unless a covenant in the mortgage provides for an allowance to the mortgagor in case of foreclosure."

And at section 856 it is said:

"The relation held by the mortgagee does not itself make him responsible for permanent improvements or essential additions made to the estate by the mortgagor, or enable a party furnishing work or material for improvements to maintain a case against the mortgagee without proof of any other facts than is disclosed by the mortgage. There must be a promise on the part of the mortgagee to pay for such work or material or the party can not obtain satisfaction from the mortgagee."

To same effect see Holmes *v.* Morse, 50 Me., 102.

It might be admitted that the implied power exists in a railway company to contract on a credit for necessary current supplies needed from day to day to keep the road in operation, but this is the extent of the power. It certainly has no power to make a superior mortgage on the corpus or an express superior lien against the earnings, so as to bind them after possession is taken by the mortgagee, for retracking the entire system. Such a power can not be conferred upon a railway company by express legislation, except the law be enacted before the mortgage is given. And it is only in cases where the mortgage creditor asks equitable relief that this court considers it has the power to displace the priority in favor of a limited class of claims. Most certainly, no power would be implied to exist in the mortgagor to do an act considered so hostile to the contract priority of the mortgagee which if given expressly by legislation would be held by the courts as void and unconstitutional because it impaired the obligation of contract. Certainly, the court will not presume the existence of such a power. No less than full and cogent evidence of express consent by the mortgagee ought to be tolerated.

From reason and authority it seems clear that petitioners are wrong in the contention that the railway in

contracting for the rail was acting as the agent of the mortgage creditors, and the superstructure builded by ingenious argument upon this unsound foundation must, it seems to us, go the way of all its predecessors. This argument being based largely upon a number of cases cited by petitioners' counsel, we will as rapidly as possible review them.

Review of Petitioners' Authorities.

Shearman v. *Assurance Co.*, L. R. 14, Eq. 4 (Brief p. 23).

This case shows that the real controversy was over the proceeds of the insurance policy and not over the premiums. The plaintiff offered before suit, and stood ready at all times, to refund all premiums paid by Pocknell after his adjudication in bankruptcy.

The opinion in the case was evidently delivered orally, is very short, and only the substance of what the Master of the Rolls said is given. But we find that "He was of opinion, however, that she ought to have accepted the offer made to her before the institution of the suit"—that is, to repay to her all premiums. The plaintiff evidently kept his offer good during the litigation, for we see that it was arranged that the costs be set off against the premiums. The case decides no point involved in this case.

In the Matter of Thorp (Brief p. 23).

The report of this case shows that it is no opinion at all, but a mere statement of issues submitted to counsel for future argument. In the outset it is said:

"The Lord Chancellor (Lord St. Leonards)—I have already stated that I do not mean to decide any question in this matter at present, and that it will be necessary that this matter should be argued with reference to the different questions, very deliberately, before the court."

And, in concluding these issues, the Lord Chancellor said:

"The result, therefore, is, that this is a case in which the parties may, by coming to some reasonable understanding between themselves upon some of these questions, save themselves from very great loss; but they will determine that for themselves, and consider for themselves what they had best do; in the meantime, I shall direct this case to stand for the first day after term, and to be regularly argued by the different parties on the points of law to which I have now adverted."

Minnett v. *Lord Talbott*, L. R. Ir, 1 Ch. D., 143 (Brief, p. 24).

In this case the committee who furnished the funds to make the improvements were members of the club, and they were, by resolutions of the club, authorized to make the improvements. At one of the meetings the following resolution was adopted:

"*Resolved*, That for the purpose of carrying out the contemplated improvements forthwith, the committee be authorized to raise the sum of £500 by debentures bearing interest at £5 per cent.—Agreed to."

On the faith of this resolution the committee made the improvements. The effect of the above resolution, if nothing further was done in reference to issuing debentures, would be to give to the persons making the improvements, with the consent of the club, an equitable mortgage on the premises and property of the club, with the right to maintain an action of specific performance, and compel the issuance of the debentures, or they might have a direct action, as was pursued in that case, and foreclose the equitable mortgage. The case is not in point here.

Mannix v. *Purcell*, 46 Ohio St. Rep., 102 (Brief, p. 25).

The legal title to the property was in the Archbishop. While there was a bitter and complicated case growing out of the right to hold the property held in trust for the Catholic Church for the private debts of the Archbishop, the case of Hendricks for that portion of his claim which was for improvements, seems not to have been very difficult or complicated, as counsel seems to think.

Hendricks obtained a general judgment in the lower court for the price of the improvements erected by him, and the Supreme Court allowed this judgment to stand. The case, as reported, don't show that Hendricks had or claimed a mechanic's or material-man's lien on the property he had improved. His counsel contended that he should be reimbursed out of the church property generally, and the court properly held that the trust property was chargeable with the trust debts.

The court said, on that branch of the case:

"Such a trustee has power, by contract, to charge the trust property with the reasonable expense of its necessary preservation, improvement and repair, in favor of one who expends money, labor or material for that purpose."

The Archbishop was required to look after the property and keep it in repair. He occupied a trust relation to the property, and for a debt contracted for the benefit of the trust estate he could be sued, and execution would run generally against all the trust property.

The Lackawanna Company was not a trustee of the railway property.

The case decides nothing here.

2 *Story Eq. Jur.* (13th ed.), p. 582, sec. 1237 (Brief, p. 26).

The section quoted and relied on, referred to improvements made upon the premises by a *bona-fide* purchaser of the premises whose title subsequently failed. This statement of the equity rule is a correct one and has general application. But he must be a *bona-fide* purchaser—that is, he must have paid a valuable consideration for the estate, and must have had no notice of the defect or prior incumbrance.

But petitioners admit they had notice of our mortgage, and hence the essential fact to make them *bona-fide* incumbrancers fail.

The author was not dealing with the right of a mortgagor to incumber the estate without the consent of the mortgagee or with priorities. He had already treated of priorities in the first volume.

1st Story's (13th ed.) Equity Jurisprudence, p. 567, section 553, says:

"In the course of the administration of assets equity follows the same rules in regard to legal assets which are adopted by the courts of law, and give the same priority to the different classes of creditors which is enjoyed at law, thus maintaining a practical exposition of the maxim, *æquitas sequitur legum*. In the like manner courts of equity recognize and enforce all antecedent liens, claims, and charges, *in rem*, existing upon the property, according to their priorities, whether these charges are of a legal or of an equitable nature, and whether the assets are legal or equitable."

And section 557 says:

"In cases where the assets are partly legal and partly equitable, courts of equity will not interfere to take away the legal preference of any creditors to the legal assets."

Smith v. *Smith*, Supreme Court Reporter (N. Y.), p. 164 (Brief, p. 27).

The equitable material-man's lien in this case did not spring out of the mere act of erecting the improvements, as counsel seem to think. "The arrangement was," say the court, "that the plaintiff was to put his own money into a building upon defendant's land, that he might derive a larger revenue from it than he would by leaving it on deposit in a bank, and when built, if he got in any way distressed, he was to have the right to sell the building—it was at his disposal."

The court holds, very correctly and upon the plainest principles, that this was an agreement to give a lien on the property to secure the plaintiff. All the plaintiff's rights grow out of this agreement.

Judge Martin then quotes Pomeroy on Equity Jurisprudence and a number of cases to show, and which do show, that when "the party promises to convey or transfer property as security, creates an equitable lien on the property so indicated, at least as between the parties." The decision rests alone upon the above principle.

We all understand that an agreement to give a mortgage creates an equitable mortgage, and an agreement for a lien creates an equitable lien. And these are the only methods known to courts of equity whereby equitable mortgages and equitable liens are created.

Bright v. *Boyd*, 1 Story, 478 (Brief, p. 28).

This is an ordinary case of improvements erected upon land by a *bona-fide* purchaser where the title afterwards fails.

As stated above, petitioners are not *bona-fide* purchasers or incumbrancers. The Lackawanna Company had notice of our mortgage when the rail was sold.

The principle announced has no application to this case.

Poland v. *The Spartan*, 1 Ware's Reports, 130 (Brief, p. 30). *Stevens* v. *The Sandwich*, 1 Peters' Adm. Decs., p. 233 (Brief, p. 30). *The Felice*, B. 40 Fed., 653 (Brief, p. 30).

The above three are admiralty cases, and as counsel concede that admiralty decisions are in no way controling in courts of equity, we will not pause to comment upon them.

Williams v. *Gibes*, 20 How., 535 (Brief, p. 35).

That was a contest over the right of certain executors for costs, expenses, and attorney's fees incurred and paid out by them in recovering a fund. At page 537 the court say:

"But it is said that these suits were defended by the executors, while claiming the fund in right of their testator, and hence for the supposed benefit of his estate; that the defense was not made in their character of trustees, and can not, therefore, be regarded as a ground for charging the estate of Williams with the cost of the litigation.

"The answer to this view is, that although in point of fact the defense was made under the supposition that the fund belonged to the estate of Oliver, yet, in judgment of law, it was made by them as trustees, and not as owners, as subsequently judicially ascertained; and as the costs and expenses were properly incurred in the protection of the fund, it is but just and equitable they should be made a charge upon it. The misapprehension as to the right can not change the beneficial character of the expense, when indispensable to its security.

"The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned, and the ex-

penses are properly chargeable in his accounts against the estate. 2 Story's Eq. Juris., sec. 1275."

In that case, and in all such cases, the party expending the money was a trustee, whose duty it was to conserve and protect the trust estate. When the rail was furnished, and at no time, has the Lackawanna Company occupied any relation of trust or otherwise to the mortgage creditors or railway company. That company was under no obligation, legal or otherwise, to sell the rail to the railway company. There appears to be no analogy between the above case and the case at bar.

Hammond v. *Danielson*, 126 Mass., 294 (Brief, p. 41). *Tucker* v. *Warner*, 49 N. Y. State Rep., 571 (Brief, p. 41). *Scott* v. *Delahunt*, 65 N. Y., 128 (Brief, p. 43). *Williams* v. *Allsup*, 10 C. B. N. S., 416 (Brief, p. 44). *In The Canada*, 7 Sarvy., 173 (Brief, p. 46). *White* v. *Smith*, 44 N. J. L., 105, 113 (Brief, p. 46).

The above six cases are cited and relied on by counsel for petitioners as supporting their contention that there was implied agency to create a superior lien for the price of the steel rail.

In all six cases the subject of the lien was personal property, and such personal property was put in the possession of the mechanic or artisan. In the next place, the work done was for ordinary "repairs," and not for rebuilding or reconstructing the hack or boat upon which the work was performed.

In none of the cases was a lien claimed on a railroad or on ordinary real estate.

The distinction in the subject-matter of the lien is important. For before it becomes necessary to inquire whether or not a mortgagor in possession has the implied

power to contract a debt for repairs and to create an equitable mechanic's lien thereon superior to a prior mortgage, when the subject-matter of the lien is real estate or a railroad, it is first to be learned whether at equity or at common law a lien can arise on such property in favor of a material-man or mechanic.

It has been fully shown by the authorities cited by us in the former parts of this brief that material-man's and mechanic's liens on lands are wholly unknown at equity and common law, but are "creatures of statute." And we have also shown that the general lien law has no application to railroads. And counsel in their brief admit, and all the facts in the record show, that the rail was used not for "repairs," but for "retracking the entire system." So the above cases can not control this one, and really have no application to a railroad. But we think it has been shown also from the large number of cases and authorities cited and quoted in this brief that the mortgagor of real estate and railroads have no such implied power as is contended for.

Wood v. *Guarantee Co.*, 128 U. S., 416, 421 (Brief, p. 48).

This was the case of the holders of a part of the coupons of certain mortgage bonds issued by a water works company against the balance of the bonds and coupons, claiming priority on the ground that the coupons were sold in payment of material used in the construction of the waterworks system, and the holder of said coupons sought to shelter himself under the doctrine of Fosdick *v.* Scholl. In passing upon that question this court, in referring to the argument in support of said contention, say:

"The argument is unsound. There are several answers to it. *First*, it overlooks the vital distinction

between a debt for construction and operating expenses. *The doctrine of Fosdick* v. *Scholl is applicable wholly to the latter class of liabilities.* In the case of Cowdry *v.* Galveston Railroad Co., 93 U. S., 352, it was settled that the doctrine does not apply where it is a question of original construction. *Secondly*, it overlooks the important fact where there is a diversion of the income of a 'going concern' from the purpose to which that income is equitably primarily devoted, viz., the payment of the operating expenses of the concern. * * * In this case it is not pretended that the money used in paying the 117 coupons in question was income of the waterworks company."

This case decides absolutely nothing for petitioners. Every point decided is against them.

Union Trust Company v. *Morrison*, 125 U. S., 592 (Brief, page 49).

The case is wholly unlike the case at bar. The Trust Company had a mortgage on a railroad dated OCTOBER **2, 1871.** The interest was payable semi-annually, and in case of default the trustee had the right to declare the whole debt due and take possession. In OCTOBER, **1873,** the railway company defaulted, and likewise at every subsequent interest period. One Holbrook had a judgment against the company for $9,500 and costs, and in OCTOBER, **1874**—about a year after default by the company in its interest payments—was about to levy an *alias* execution on certain locomotives. The railway company believed the judgment to be void, and in DECEMBER, **1874,** obtained an injunction against the levy of the execution until the injunction case could be disposed of. Morrison signed, as surety, the injunction bond, and finally had the judgment to pay, amounting to about $13,000, including interest and costs. To secure him against loss the railway company gave him a chattel mortgage on certain engines of the company.

The mortgage bondholders indulged the company in its repeated defaults, and not until NOVEMBER, **1877** — more than four years after the default—did the trustee declare the debt due, file a bill, and cause a receiver to be appointed.

On petition of the receiver, about DECEMBER, **1877,** the court authorized him to indemnify Morrison against loss out of funds in his hands. For lack of funds, however, this was not done, and on JUNE **30, 1881,** Morrison filed his intervening petition praying to be reimbursed. The Circuit Court granted the relief. Its decree was affirmed by this court,—and properly so, and in accordance with established principles.

By failing to exercise their clear legal right—and we might say duty—to take possession and operate the road after the railway company had become insolvent as shown by their repeated defaults in interest payments, the mortgage creditors impliedly consented that the railway company should operate it for them and in their stead.

After default the mortgage creditors were practically the owners of the road and were under the mortgage entitled to immediate possession. And it is precisely as if the mortgage creditors had taken possession and then appointed the railway company or its officials to conduct, manage, and control the business for them. In equity, under such circumstance, the court will consider that as done which should have been done, and deal with the case as if the mortgage creditors had exercised their right and were in actual possession, and had requested Morrison to sign the bond. In delivering the opinion this court, in referring to the peril of the property by reason of the threatened levy, say:

"The trustees of the mortgage might have prevented

such a catastrophy, it is true, by filing a bill of foreclosure and for an injunction and receiver; but they did not choose to take this course until nearly three years afterwards. On the contrary they allowed the railroad company to continue to use the property and to take care of it for them."

And further on it is said, at page 612:

"The appellants place much reliance on the case of Burnham *v.* Bowen, where it is held that debts for operating expenses are privileged debts to be paid out of current income; and that if such income is divested by the mortgage trustees or the receivers for the improvement of the property such debts will be decreed to be paid out of the mortgage fund. But it was added by way of caution: 'We do not now hold any more than we did in Fosdick *v.* Schall, or Huidekoper *v.* Locomotive Works, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the company. All we then decided and all we now decide is, that if current expenses are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' It is this remark on which the appellants rely. It is not our intention, however, to decide anything in the present case in conflict with it. The claim in that case was for operating expenses only, and the rule laid down had special reference to them. The present case is of a different character, based on a *bona-fide* effort made by the intervenor to preserve the fund itself from waste and spoliation *after the mortgage was in arrears and the right to reduce it to possession had accrued.*"

The case is not an authority here, because the rail in the case at bar was sold long before there had been any default in interest payments, and while the company was paying promptly.

In addition to Morrison's equity, he had a chattle mortgage on certain locomotives, and his claim had, by a previous order not appealed from, been ordered paid by the receiver. It was upon all these considerations that he was decreed a priority.

Louisville Railroad Co. v. *Wilson*, 138 U. S., 501 (Brief, p. 55).

In this case Mr. Wilson, an attorney, intervened in a railway receivership case, and claimed compensation for certain professional services, and asked priority over the mortgage creditors. His claim consisted of three items.

The first was for services rendered under an employment by the railway, made prior to the receivership, to recover certain engines and rent due for their use from another company. The services continued over until after his client, the railroad company, and all its effects were placed in the hands of a receiver. Certain sums of money were recovered by him and by him paid, not to the railroad company, but to the receiver.

The second item was for services rendered certain persons interested in the railway who advanced money to pay employees of the road, and who took, upon his advice, assignment of the pay rolls, and who afterwards secured payment of such claims.

The third item was for services rendered the railway company in an equity suit to enjoin the enforcement of a mortgage on one of the divisions of the road, which appears from the record to have resulted successfully; and by reason of his services he preserved unity of control, and it was claimed that he thereby conferred a benefit on the bondholders by enabling the company to earn interest on the bonded debt.

Only the first item of the claim was allowed by this

court, and that was on the ground that the attorney performed services for the receiver by putting the money he recovered in the hands of the receiver, and that the attorney had an equitable lien on such funds; and he was allowed $300 for his services in that case.

Miltenberger v. *Logansport Railway Co.*, 106 U. S., 286 (Brief, p. 57).

The opinion contains, on account of the complicated condition of the case, a long history of the proceedings before we come to the opinion proper.

Two classes of claimants asserted priority in that case. One was for claims which arose during the receivership under orders made by the court after all the objecting parties had been made parties to the suit and duly served, and from which orders no appeals were taken. All those claims were created by the court, and they, of course, stand upon a different basis to debts contracted by the company.

Having disposed of those claims, the court, at page 311, comes to the consideration of the claims that arose prior to the receivership. The opinion is silent as to the character of claims that were allowed priority, except by inference. They are referred to in the opinion (top of p. 311) as "due other and connecting lines of roads for material and repairs and for ticket and freight balances."

We judge that this language refers to merely current expenses of operation, for when the principle upon which the allowance of such claims is discussed the court refers to those claims inferentially as "unpaid debts due for operating expenses accrued within ninety days," &c.

So the case decides nothing for petitioners.

Thomas v. *Western Car Co.*, 149 U. S., 39 (Brief, p. 61).

This case decides two very important questions involved in this case.

One is the disallowance of amounts due the car company for rental of cars for six months prior to the receivership, and the other for disallowance of claim for *rebuilding or reconstructing* of certain cars. Both points are in our favor.

In passing on the claim for car rental for the six months prior to the receivership the court, after quoting the Kneeland case say (pp. 111, 112):

"And accordingly all claims for rental of cars prior to the appointment of the receiver were disallowed.

"Tested by the principles asserted in these cases, the claim for car rental that had accrued prior to the receivership can not be maintained, but should have been disallowed.

"The case of a corporation for the sale and manufacture of cars dealing with a railroad company whose road is subject to a mortgage securing outstanding bonds is very different from that of workmen or employees or those who from day to day furnish supplies necessary to the maintenance of the road. Such a company must be regarded as constructing upon *the responsibility of the railroad company* and not in *reliance upon the interposition of a court of equity.*"

And in passing on the claim for repairs and reconstruction of the cars the court allowed the claims for ordinary repairs, but not for rebuilding the cars. (See page 16.)

Kneeland v. *Am. Loam Co.*, 136 U. S., 89 (Brief, p. 61).

In this case the court disallowed a claim for car rental during a prior receivership of the road.

It is in this case where Mr. Justice Brewer used the often-quoted language about no one being compelled to deal with a railroad, etc., quoted in our principal brief, pages 32 and 33.

The case decides nothing to sustain the claim here asserted.

Kneeland v. *Luce*, 141 U. S., 491 (Brief, p. 63).

The question in this case was as to whether receivers' certificates issued by order of the court, with the express consent of the prior mortgagee, were entitled to priority in their payment as against such consenting mortgage. The headnotes state this case fully.

This court held, upon the plainest principles, that the receivers' certificates were, on account of such consent, entitled to priority.

Olcott v. *The Supervisors*, 16 Wallace, 678 (Brief, p. 64).

The case decides nothing here, as is shown by the statement of Mr. Justice Strong at the beginning of the opinion, on page 688. He says:

"Whether the act of Assembly of the State of Wisconsin, approved April 10, 1887, under which the county orders or promissory notes sued upon in this case were issued was a lawful exercise of constitutional power is the only question in the case."

Burton v. *Barbour*, 104 U. S., 126 (Brief, p. 63).

The only question involved, and the only one decided, was that a receiver could not be sued in a court other than the appointing court without leave of that court.

Wallace v. *Loomis*, 97 U. S., 146 (Brief, p. 65).

This case simply reaffirms the settled doctrine that a court of equity having property under its control may legally authorize the issue of receivers' certificates.

While the rule announced in the cases cited by petitioners' counsel may apply to chattels under circumstances surrounding those particular cases for ordinary

"repairs," the rule does not apply to real estate and railroads for permanent improvements and betterments.

Jones on Corporate Bonds and Mortgages (2d edition of Railroad Securities), section 606, says:

"The doctrine of Fosdick *v.* Schall has thus far never been applied to any case other than that of a railroad. The case itself laid great stress on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work; and it has been repeatedly decided that this equitable doctrine is not applicable to other corporations."

And it might well be added that the rule in other cases has no application to this doctrine, for such is the effect of the cases. At any rate, counsel has cited no case where this extraordinary power has been held to exist in a railroad company.

III.

Petitioners' second point is that the mortgage gave no lien upon the earnings of the road after it was placed in the hands of receivers in causes 185 and 198, and that as one interest payment was made these bondholders by the receivers in cause 198, that to the amount of such payment there was a division, &c.

We have already presented our views of this question in our principal brief, pages 14 to 25, and a repetition would be useless.

We there attempt to answer this on the ground, among others, that the facts in the record show that petitioners' claim was not a current debt for operating expenses, but was a general debt of the railway company for rail sold it for purposes of general construction, and the conclusion was reached by us that petitioners could not complain of division, if there had been any in fact, for

it is only the favored few—the current expenses creditors—who can justly complain of division—a general creditor, never!

We pause to say that petitioners having agreed with us on the facts—that is, that their claim is not of the current debt class—it only remains for this court to say whether petitioners can complain of division.

We deny the claim that there was a division, and ask the court to read our brief on that point.

IV.

Petitioners' counsel contend under their fourth, fifth, and sixth points that the mortgage did not cover the income after possession was taken, and that there should be a *pro-rata* distribution of the income.

The point is fully discussed by us in our brief, pages 14 to 25, and what we say there will not be repeated here.

This question is discussed by counsel as if it depended solely upon the terms of the mortgage. Indeed, the mortgage so plainly gives a lien on the income after possession is taken, we feel that the whole question could with safety be allowed to rest on the terms of the mortgage alone. But that is not at all necessary, for the mortgage bondholders have a lien superior to petitioners' claim on the revenue arising from the operation of the road by the receivers, on two distinct grounds:

First. The mortgage in plain terms gives it.

Second. This superior lien was acquired by filing the bill to foreclose and by causing the property to be placed in the hands of a receiver on the application of the trustee in the mortgage. In other words, by an equitable levy on the income.

These questions in reference to this particular mort-

gage and equitable levy, on this particular income, were raised, fully argued, and, as we supposed, finally settled and put at rest in the case of Geo. E. Downs *v.* Farmers' Loan & Trust Co. (79 Fed. Rep., p. 221).

The terms of the mortgage relied on by us as conferring a lien upon the income will be found on Record, page 15, and is as follows:

"And in case the said Houston and Texas Central Railway Company shall fail to pay the principal, or any part thereof, or any installment of the interest, or any part thereof, on any of said bonds at any time when the same shall become due and payable according to the tenor thereof and for sixty days after having been demanded, it shall be competent for the said trustee, its successors or assigns, to enter upon the said railway and premises and property herein conveyed, by its attorneys and agents, and take possession of same without let or hindrance of the said first party and every part and parcel thereof, and the appurtenances, and appoint an agent to operate and manage the same, and receive the revenue and income thereof, applying the said funds, after deducting taxes, necessary expenses and counsel fees, to keep the same in good order and repair, and the surplus to pay the principal and interest of all the bonds which may be due and outstanding, and secured hereby, pro rata, and thereafter, to the payment of any contributions due to the sinking fund herein established. And upon the request of the holders of one-fifth in amount of the bonds so in default which may be at any time outstanding under this deed of trust, it shall be the duty of said second party, by its president or agent duly appointed in its behalf, to enter upon and take actual possession, with or without entry, or foreclosure of said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management until the arrears of both principal and interest be paid, or the property sold, as herein described, receiving the rents, revenue and income thereof and applying them in the same manner as above stated."

The Court of Appeals, after hearing the same arguments and reading the same cases cited, decided that the mortgage bondholders had a lien on the income after possession was taken.

We will not undertake to quote from the opinion; but as our arguments in answer to all arguments made denying our lien on the income, we cite this court to that opinion.

The lien is equally well secured to us by the equitable levy on the income.

This point was raised and settled in the case of Sage *v.* Memphis, &c., Ry. Co., 125 U. S., 361. That was a case where Sage, a judgment creditor, having no mortgage, filed a bill and caused a receiver, to be appointed, of the railway property. Net income was accumulated by the receiver. This net income was claimed by the mortgage bondholders, who had a mortgage giving a lien after they had taken possession. But they never took possession or made any move to have a receiver appointed.

This court, speaking through Mr. Justice Harlan, in delivering the opinion in that case, at page 379, said:

"But we do not perceive any legal ground upon which they are entitled to the net earnings of the property, while it was in the hands of the receiver, in a suit instituted by a judgment creditor for the protection of his own interests and not of the interests of the trustees or of the bondholders or of other creditors. This suit was, in effect, an equitable levy."

Sage put the property in the hands of a receiver to protect his interest, and the complainant in this case pursued the same course. The mortgage of the bondholders in the Sage case contained a clause like ours, and this court conceded in its opinion that their rights would

have been superior to those of Sage's if they had taken steps to put the property in the hands of a receiver.

So it seems from the foregoing that it is clear that we have a lien on the income.

This disposes of all the points raised in petitioners' brief, except the general discussion of their claimed or supposed superior equities which may be found running throughout the brief.

In concluding this brief, we desire to notice the points made on that branch of the case.

The Equities of the Case.

Petitioners have stated the equities of their case and the principles upon which they rely, and have recited the facts which they claim are in the case to support the claimed equities, and have left it to us to state such equities as we have, if any.

Our purpose in presenting the equities of the case is to examine the grounds of petitioners' claim and to compare the equities of the petitioners and respondents in the light of the record. And while we do this as an advocate, we shall not intentionally omit a single fact or circumstance in the record which will be of benefit to petitioners, or attempt to color the facts in favor of respondents.

The alleged facts upon which petitioners seem to rely to sustain their claimed superior equities, are :

First. That they sold the rail to the railway company on a credit and they have not been paid for, and that the debt is just and should be paid.

Second. That when the rail was sold to the railway company its track was practically worn out and in the condition of dilapidation as reported by the master.

Third. That the rail saved and preserved the property and kept it a "going concern" and enabled the railway company to continue its existence.

Fourth. That on account of the sale of this new rail, old rail was taken up and sold for a large sum of money, which came into the hands of the receiver.

Fifth. That the Lackawanna, with full knowledge of the situation, and appreciating the importance to the railway company of the supplies furnished, sold the rails, took no collateral security, and expected to be paid out of the income.

Sixth. That the Lackawanna Company in selling the rail relied upon the fact that its supplies saved and preserved the property, kept it a going concern, and conferred a benefit upon the mortgage creditors.

Seventh. That with the rail sold the track of the railway company was practically rebuilt.

This is not the language in which the claimed facts are stated, but their substance will, we think, be found in the above seven subdivisions, and petitioners apparently rely on no other facts.

It will be noticed that in the statement of the alleged facts it is admitted that respondents had, when these rail were sold, a valid subsisting prior mortgage on this property, and that the Lackawanna Company had notice of its existence.

It is not claimed that the mortgage creditors were consulted in the matter of buying these rail, or as to the advisability of making the purchase of the rail on credit.

It is not claimed that they even had any knowledge of the purchase.

It is not claimed that the mortgaged premises, consisting of 54 miles of railway and about 250,000 acres of land, was not ample security for the mortgage debt, which at that time was but little over $1,000,000.

It is not claimed that a single default had ever been made on an interest payment due on these bonds prior to the purchase of the rail.

It is not claimed that a single additional dollar of net revenue was earned over and above what was being earned before the purchase.

It is not claimed that the property sold for a single dollar additional on account of these rails.

It is not claimed that after said rails were bought and put on the road that the interest on the mortgage debt was regularly paid, or that the mortgage indebtedness was better secured thereby, and that no trouble was ever afterwards experienced by them in the collection of their principal and interest.

No! Counsel would not say so. They couldn't, for tested by the record, every fact which petitioners' counsel failed to state, as indicated above, is substantially an affirmative fact, and all the alleged facts relied on to support the superior equity are wholly without existence except numbers 1, 2, and 7.

In other words, petitioners' case as made by the record is an ordinary case of a sale of rails by one corporation to another on a credit, and which have not been paid for, and that the sale was made and understood to be for the purpose of retracking the road of the railway company without the shadow of any benefit to the mortgage creditor, but which in our judgment was the immediate cause of all the subsequent troubles and disasters to railway and bond creditors, and the precipitation of this litigation, which has lasted more than fourteen years, causing a loss to the bondholders of hundreds of thou-

sands of dollars, to say nothing of court costs, attorneys' fees, and other expenses of litigation.

But we desire to examine more minutely petitioners' alleged equities as against the mortgage creditors.

The chief ground of equity is that the rail saved and preserved the property and kept it a "going concern," and in that way aided the security—conferred a benefit on us. There is not the shadow of a fact in the record to justify this claim. None of the evidence is in the record, and the only facts are those reported by the master; and he does not, in the remotest, hint at the question as to what effect the rail had on the security, or whether or not the security was ample with the old rail, or whether the laying of the rail kept the road a "going concern" as claimed.

Petitioners allege in their petition that all these and many more beneficial results followed the laying of the rail; but the master, to whom was committed the authority to hear the evidence and report the facts, does not so find.

If the mortgage security was insufficient just before the rail was furnished, but afterwards became better or first class as a result of the laying of the new rail, that fact was doubtless susceptible of proof.

If the road was not in fact a "going concern" and promptly meeting its obligations, including bonded interest, that fact could have been proven.

If the laying of the rail increased the net earnings of the road or caused it to sell for a better price, that fact could have been proven.

If, in short, any fact existed which showed that a dollar has come, or will ever come, into the pockets of these mortgage creditors as a result of the laying of these rail, it looks like that fact could have been proved, and the master could have been induced to so report.

We find no such fact in his report. But while we find a total absence of any fact showing or tending to show the effect of the rail on the mortgage security, we do find many facts in the master's report which show that very soon afterwards a dire calamity followed, and from the effect of which these bondholders have not recovered, and will never recover. This calamity was the throwing of the whole system in the hands of receivers, in about a year and a half after the last delivery of rail, by a general creditor, and which engendered a bitter and extended litigation, which lasted for more than thirteen years, resulting in a loss to the mortgage creditors of more than $200,000 of their debt, to say nothing of expenses of litigation.

Whether there is *causal* connection between the incurring of this large debt for rails, and its rapid payment out of the earnings of the road in preference to other debts of the company, and the precipitation of the receivership and the resultant losses may not be clear.

One thing is clear: That for more than twelve years preceding this large purchase of rail the bonded interest was promptly paid, and for more than twelve years immediately after not a dollar of principal or interest was paid on bonded interest except the interest for one year paid by the receivers in cause 198.

Another thing is clear: This railway company was the pioneer road of Texas, built in ante-bellum times, and had weathered every storm, not excepting the "late unpleasantness," and was promptly meeting its obligations until the purchase of this rail, but in less than a year and a half it was in the hands of receivers, and in less than three years all its property was sold under foreclosure decrees and its "continued existence" collapsed and its name passed into ancient history.

The cause and effect may not connect, but whatever

may have caused these financial disasters, it is clear that these bondholders derived no benefit from the laying of these rail, and if they were sold by the Lackawanna Company as a friendly act to us and the road to keep it a "going concern," and to "continue its existence" and "enable it to pay its interest," we are disposed to exclaim, The Good Lord "deliver us from our friends!" Petitioners have shown no equity against us—that is, no benefit conferred upon us, and our mortgage being valid and being first in time is first in right.

The remarks of this court in the case of Railway Company *v.* Wilson, 138 U. S., 501, in passing on the claim of an attorney who has successfully enjoined certain mortgage creditors from selling one division of the road. He claimed that his services resulted in unity of control and enabled the road to earn bonded interest. But the facts in that case, like this, showed no bonded interest accumulated and paid to the bondholders.

This court say, on page 509:

"It can not be that security bondholders are liable, either in law or in equity, for the expenses incurred by their debtor in carrying into effect a scheme which the latter believes will enable it to pay its interest to them but which in fact does not accomplish such result. It was the debtor's act, and if it failed of accomplishing hoped-for results the party employed must looked to his employer alone for compensation and can not charge the bondholders therefor, on the theory that it was believed that it might inure to their ultimate benefit."

The facts collated and the authorities cited in this brief show, we think, that petitioners' claim for an equitable material-man's lien does not exist; that the demand for *pro-rata* distribution of the income must be denied, and the claimed superior equities arising from alleged benefits conferred have disappeared.

This leaves the case where it belongs.

A sale of rail on the general credit of the company, for purposes of construction, and that the debt can not be classed as a current debt, and the claimed priority ought to be denied.

We present our views on this subject fully in our brief already filed. We refer to pages 1 to 13 for a full discussion of this subject.

Respectfully submitted.

L. W. CAMPBELL,
Solicitor for Respondents, Moran Bros. and Henry K. McHarg.